90-1329

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

**In re: KOREA SHIPPING CORP., LTD.,
Now Known as HANJIN CONTAINER LINES, INC.,
Owner of the Korean Wonis One, For Exoneration
From or Limitation of Liability,**

KOREA SHIPPING CORP., LTD.,

Petitioner,

vs.

TOKIO MARINE & FIRE INSURANCE COMPANY, LTD., MALAYAN OVERSEAS INSURANCE COMPANY; VSI HARDWARE INDUSTRIES SCITECH MEDICAL PRODUCTS, INC.; MORRISON LINE, INC.; INTERNATIONAL CARGO & SURETY INSURANCE COMPANY;

(Additional Respondents continued on reverse side.)

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Additional Respondents:

AMERICAN TRADING & PRODUCTION CORPORATIONS; NEWELL COMPANY; FIREMAN'S FUND INSURANCE COMPANY; ROCKWELL INTERNATIONAL; COMPASS INTERNATIONAL, INC.; JANKA, INC.; USA MAXAM, INC. dba Wholesale World; MIGHTY ENTERPRISES, INC.; WEITA INTERNATIONAL CORPORATION; ALL PACIFIC TRADING, INC.; THOMAS MONAHAN COMPANY; SUN INSURANCE COMPANY; GRE TALBOT; BIRD & COMPANY, as subrogor for RYDER FREIGHT & CUSTOMS SERVICES AND COLLENZIONE EUROPE USA, INC.; CATHAY COMPANY, LTD.; TRAVELERS INDEMNITY COMPANY; ARCHE & COMPANY, LTD.; GREAT AMERICAN INSURANCE COMPANY; JEURO CONTAINER TRANSPORT USA, INC.; A.O.K. INTERNATIONAL, INC.; LEP INTERNATIONAL (FAR EAST), LTD.; AEMPAC SYSTEMS, INC.; AIDCAR COMPANY, LTD.; REGAL MANUFACTURING COMPANY; RECOVERY SERVICES INTERNATIONAL

QUESTION PRESENTED

Is the recovery fund under the maritime law of limitation of liability now to be chosen by reference to the choice of law principles set out in *Lauritzen v. Larsen* (1953) 345 U.S. 571?

PARTIES TO THE PROCEEDING

Rule 29.1 List Of Parent And Subsidiary Companies

Petitioner Korea Shipping Corp., Ltd., as claimant of KOREAN WONIS ONE, is now wholly absorbed into HANJIN CONTAINER LINES, INC., and the vessel has been renamed HANJIN YOSU. There are no affiliates or subsidiaries of the petitioner.

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No. _____

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CONTAINER TRANSPORT USA, INC.; A.O.K. INTERNATIONAL, INC.; LEP INTERNATIONAL (FAR EAST), LTD.; AEMPAC SYSTEMS, INC.; AIDCAR COMPANY, LTD.; REGAL MANUFACTURING COMPANY; RECOVERY SERVICES INTERNATIONAL,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioner Korea Shipping Corp., Ltd. respectfully prays that a writ of certiorari issue to review the decision and opinion of the United States Court of Appeals for the Ninth Circuit issued in this proceeding on November 26, 1990.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 919 F.2d 601 (9th Cir. 1989), and is printed herein as Appendix A. The Order of the District Court was not published, and is printed herein as Appendix B.

JURISDICTION

Korea Shipping Corp., Ltd. as plaintiff-in-limitation, brought a complaint in admiralty on October 17, 1988, under 28 U.S.C. § 1333(1) and within six months of notice of first claim, as required by 28 U.S.C. § 183. The proceeding was brought according to the Supplemental Admiralty Rules, particularly Rule F, and a limitation undertaking for $1.32 million was posted in the District Court. Judgment of dismissal was entered

September 12, 1989, but the District Court has retained jurisdiction of the limitation undertaking which, as the *res*, constitutes the object over which continuing subject matter jurisdiction is exercised.

Timely appeal was filed to the Ninth Circuit on October 11, 1989, and its opinion sustaining the District Court issued on November 26, 1990. This petition is timely under Supreme Court Rule 20.4.

The jurisdiction of the Court to review the decision of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1). The writ is sought under Supreme Court Rule 17.1(c) on the grounds that the Ninth Circuit's opinion is in conflict with applicable decisions of this Court.

STATEMENT OF THE CASE

Plaintiff Korea Shipping Corp., Ltd. is a Korean corporation which owned the Korean-flag vessel KOREAN WONIS ONE. While KOREAN WONIS ONE was alongside the wharf in Korean territorial waters, about forty containers of cargo bound through Korea to the United States were saturated with saltwater and damaged. The containers were physically on board the vessel at the time they, and their cargo, were wetted.

KOREAN WONIS ONE proceeded to Los Angeles, discharged its cargo, and petitioned to limit its liability under 46 U.S.C. § 183, *et seq.*, claiming that the amount of its liability would eventually be limited to the fund established by the law of the vessel's flag; Korean law sets a limitation fund at $415,698.

The District Judge initially set the limitation bond at $1.32 million (being the U.S. limitation fund), and acted under authority of *The NORWALK VICTORY*, 336 U.S. 386 (1949). This was, we believe, the correct procedure.

Thereafter numerous claims and answers in limitation were filed, amounting to about $1.15 million. Cargo claimants asserted that the shipowner was liable under the U.S. Carriage of Goods by Sea Act, 46 U.S.C. § 1300, *et seq.*, which by its terms applies to all common carriage of goods by water in international trade. The total of cargo claims was less than the U.S. fund, but was larger than the Korean fund.

Upon motion practice, the district court dismissed the limitation petition on the grounds that, in an action governed as to ultimate liability by the U.S. Carriage of Goods by Sea Act, no foreign limitation fund was permitted, even where the Korean contacts were so clear. The Court held that the, admittedly obsolete, choice of law rules of *The TITANIC*, 233 U.S. 718 (1914) and of *The NORWALK VICTORY*, 336 U.S. 386 (1949) applied, rather than the more generally accepted rules of *Lauritzen v. Larsen*, 345 U.S. 571 (1953).

The Ninth Circuit affirmed the district court, holding that, in a case governed by U.S. substantive law, only a U.S. fund was acceptable, under the rules of *The TITANIC* and of *The NORWALK VICTORY*.

In its opinion, the Ninth Circuit stated that, because the Carriage of Goods by Sea Act substantively governs the underlying rights of the parties, "there is no need to go further." (919 F.2d at 605.) The circuit court is in error, omitting to address 46 U.S.C. § 1308, Section 9 of COGSA, which expressly states that the provisions of COGSA "shall not affect the rights and obligations of the carrier" under the Limitation of Liability Act. The existence of a domestic law of substantive liability does not preclude choice of law analysis as to the amount to which the liability is to be limited and Mr. Justice

Holmes so held in *The TITANIC*.[1] We are, however, not seeking *certiorari* for error correction, but to address a more important point of policy crushed by the Ninth Circuit's opinion: the position of *Lauritzen v. Larsen* in the choice of law analysis under the Limitation Act.

The Ninth Circuit flatly denied any role to *Lauritzen v. Larsen* in choice of law decisions in limitation, declaiming that only *The TITANIC* and *The NORWALK VICTORY* were applicable. It was, and is, Korea Shipping's position that the Ninth Circuit was in error to disregard *Lauritzen v. Larsen*, and that, in so doing, it has created confusion and discord in the area of admiralty law where this Court has ruled *Lauritzen* is to be considered the general rule for choice of law analysis.

REASONS FOR GRANTING THE WRIT

1. The American Limitation Fund Is Generally Inadequate In An Action Involving Cargo Damage

In civil law countries, limitation of liability was a general maritime law privilege: in common law countries, it was a right created by statute only. Today, for many civil and common law countries, the statutes and general law have been superseded by treaties: there are currently three variations, the Limitation Conventions of 1924, 1957 with Amendments, and 1976 (See 6 *Benedict on Admiralty*, Rev. 7th Ed., ¶ 5 in its entirety).

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[1] "(The Limitation Act) does not impose, but only limits, the liability, — a liability assumed already to exist on other grounds. The essential point was that the limitation might be applied to foreign ships if sued in this country, although they were not subject to our substantive laws." 233 U.S. at 733.

The United States is signatory to no Limitation Convention.

In 1851, when the United States created its Limitation of Liability Act, it followed English precedent. England thereupon changed to an entirely different system in 1854, and the American system has developed in a unique fashion ever since.[2] As it now stands, the Limitation of Liability Act of the United States is remarkably concise (46 U.S.C. §§ 183-189) and, when read with Supplemental Admiralty Rule F and a few key cases, a remarkably complete code of law. It provides for exclusive national jurisdiction, in admiralty, and for venue in any district court; it provides a decisively short statutory period for invoking limitation, of six months; it requires service and notice to all interested parties; it compels their attendance in a single forum, and enjoins prosecution of any related actions in federal *and* in State courts. It imposes liability for injury to person or property where the injury occurs due to the negligence or want of due diligence of the vessel's officers or crew, but without the "privity or knowledge" of the shipowner as to the cause of the injury. Finally, it provides an actual cash fund from which all claims will be distributed, thereby avoiding insolvency, preference and execution problems.

It would be a wonderful, and generally applauded, system if it did not have an inherently incapacitating defect: the fund to be distributed in a cargo damage action in the United States is generally derisory.

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[2] The history of limitation can be found in *The MAIN v. Williams*, 152 U.S. 122 (1884), and in Donovan, *The Origins and Development of Limitation of Shipowners' Liability*, 53 Tul. L. Rev. 999 (1979), which is the first article in a useful volume devoted to limitation issues.

Essentially two regimes exist for the creation of funds: the tonnage value, and the abandonment or residual value, systems. All Conventions use the tonnage value, which assigns a particular value to each ton of the vessel's displacement and declares the total tonnage value to constitute the vessel's fund. The advantage of this system is that there is never a "zero" fund: the disadvantage is that the fund can be less than the vessel's residual market value.

The modern Conventions, and the national laws created thereunder, provide for increases in the per-ton value at intervals: this accommodates inflation, and is a recognition that courts are understandably hostile to parsimonious limitation funds. The Convention systems in general are well understood, widely recognized, practical and reasonably generous. The accession of a large number of states (particularly to the 1957 Convention) means that a high degree of mutuality exists among the world's leading maritime nations.

The United States stands forlorn.

The United States, in cases of cargo damage, uses the unalloyed abandonment system: the ship is constructively abandoned to the Court by deposit of a fund in the amount of the vessel's actual market value *after* the accident. This legal fiction, of abandonment, is replete with injustice.

> "This system of post-voyage valuation creates anomalous results. The highest possible fund is created in minor accidents that leave the ship seaworthy, cases in which mere cargo or slight vessel damage is most likely. By contrast, the lowest possible fund is created in major disasters, cases

> that leave a sunken ship and perhaps a few lifeboats."

Rickard, Comment, *A New Role for Interest Analysis*: 21 Tex. Int. L.J. 495 at 497 (1986).

This is a uniquely bad system confined to the United States. There is no way, short of an act of Congress, to change it as to American vessels, crews and cargoes in American courts — but there is no reason why foreign shipping interests should be held hostage to an idiosyncratic domestic rule.

> "The purpose of a conflict-of-law doctrine is to assure that a case will be treated in the same way under the appropriate law regardless of the fortuitous circumstances which often determine the forum."

Lauritzen v. Larsen, 345 U.S. at 591 (1953).

2. The Court Should Declare That *Lauritzen v. Larsen* Principles Will Govern The Composition Of Foreign Vessel Limitation Funds

> "There is no clear rule for determining choice of law questions in limitation proceedings . . . (I)t may well be that the Court's conscience is the guide in resolving choice of law questions."

Gunn, *Limitation of Liability*, 8 Mar. Law 29, 38 (1983).

The traditional rules of choice of law as to the limitation fund can be stated, with apparent clarity, as follows:

> a) Any shipowner can petition to limit under U.S. law and can

invoke the statutory U.S. fund [*The SCOTLAND*, 105 U.S. 24 (1881)];

b) In any U.S. limitation procedure, no fund greater than the statutory U.S. fund may be legitimately permitted, regardless of the underlying legal liability [*The TITANIC*, 233 U.S. 718 (1914)];

c) In any U.S. limitation procedure, a fund less than the statutory U.S. fund may be allowed, upon a finding that the foreign right to limit was substantive [*The NORWALK VICTORY*, 336 U.S. 386 (1949)].

The absolute rule of *The TITANIC* was considered a straitjacket, from which the rule of *The NORWALK VICTORY* provided only partial release. The issue in *The NORWALK VICTORY* and in all subsequent cases was whether the foreign limitation law itself was "substantive." No one has ever been able to determine quite what the Supreme Court meant when it distinguished procedural limitation rights from substantive limitation rights: see generally Judge, later Justice, Harlan's opinion in *Bournias v. Atlantic Maritime Co., Ltd.*, 220 F.2d 152 (2d Cir. 1955), and Comment(b), *Restatement of Conflicts*, 2d § 122, (1971).

A close reading of *The NORWALK VICTORY* suggests that both majority and dissent were unhappy with the artificial constraints of the procedural/substantive analysis.

> "Justice Frankfurter observed that the interstices of procedure contained a great deal of substance. Procedure in a limitation action is permeated with substance."

Staring, *Limitation Practice and Procedure*, 53 Tul. L. Rev. 1154 (1979).

The chaos that has been separately produced by *The NORWALK VICTORY's* "procedural" test and by the strict rule of *The TITANIC* can be observed by a comparison of two pairs of cases: *In re Bethlehem Steel Corp.*, 631 F.2d 441 (6th Cir. 1980) with *In re Geophysical Corp. (The ARCTIC EXPLORER)*, 590 F. Supp. 1346 (S.D. Tex. 1984); and *In re Chadade Steamship Co. (The YARMOUTH CASTLE)*, 266 F. Supp. 517 (S.D. Fla. 1967) with *In re Ta Chi Navigation (Panama) Corp. (The EURYPYLUS)*, 416 F. Supp. 371 (S.D. N.Y. 1976).

Bethlehem found Canadian limitation law procedural, so a U.S. fund applied; *Geophysical* found Canadian limitation law substantive! No clearer criticism of the procedural/substantive rule could exist. *The YARMOUTH CASTLE*, in a celebrated, if not uniformly accepted opinion, applied a Panamanian fund higher than the U.S. fund in violation of *The TITANIC*; the Court in *EURYPYLUS* rebuked the Florida Court and found itself unhappily constrained to apply the lower U.S. fund.

When Judge Mehrtens in *The YARMOUTH CASTLE* questioned the logic of *The TITANIC* and effectively overruled it, his frustration with a bad rule was palpable. This Court has, in the widespread acceptance of *Lauritzen v. Larsen*, the tools to limit future frustration.

Within four years of *The NORWALK VICTORY* decision, its procedural/substantive choice of law analysis had been replaced, in admiralty, by a multiple factor test.

But not in a limitation action. The occasion, *Lauritzen v. Larsen,* 345 U.S. 571 (1953), was a claim by a Danish seaman on a Danish ship that his injury was compensable under the Jones Act, because the injury occurred in U.S. waters. The Court listed seven factors that were to govern proper analysis in future.

The factors were:

1. The place of the wrongful act;
2. The law of the ship's flag;
3. The domicile of the injured party;
4. The allegiance of the shipowner;
5. The place of the contract;
6. The inaccessibility of the foreign forum;
7. The law of the forum.

In a later case, *Hellenic Lines Ltd. v. Rhoditis,* 398 U.S. 306 (1970), an eighth factor — the shipowner's base of operations — was added; but these factors are not exclusive, and courts are encouraged to reach the practical result.

Initially, the Court was feeling its way toward a new choice of law analysis. Consequently, it was not then prepared to pronounce its rule as applying generally to admiralty, and in an obscure series of footnotes (26, 27 and 28 at pages 591 and 592 of 345 U.S.) suggested that a different, universal rule applied to those aspects of limitation law that were universally recognized.

But six years later, after it found that the practicality of its decision had been met with applause, it restated *Lauritzen* principles and extended them to general maritime law.

> "The broad principles of choice of law and the applicable criteria of selection set forth in *Lauritzen* were intended to guide courts in the application of maritime law generally."

Romero v. International Terminal Op'g Co., 358 U.S. 354 (1959).

Since then, *Lauritzen* principles have been adopted and applied by all circuits to all manner of admiralty actions. A brief survey of the more active admiralty circuits (the 2d, 5th, 9th and 11th) shows that they all have welcomed the *Lauritzen* factors in personal injury and death cases.[3]

Those circuits have also applied the *Lauritzen* factors to maritime liens, whether general maritime or statutory.[4] The application of *Lauritzen* to statutory maritime liens is highly analogous to limitation: both liens and limitation are creatures of local statute, creating procedures (summary arrest, *concursus*, adjectival remedies including a fund *in rem*), and substantive local laws which give preference to national over foreign suppliers. If *Lauritzen* can fit in with maritime lien law, then it is compatible with limitation law.

No circuit court has yet applied *Lauritzen* principles to limitation actions, although two district courts have:

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[3] *Karvelis v. Constellation Lines*, 806 F.2d 49 (2d Cir. 1986); *Chiazor v. Transworld Drilling Co.*, 648 F.2d 1015 (5th Cir. 1981); *Villar v. Crowley Maritime Co.*, 782 F.2d 1478 (9th Cir. 1986); *Bilyk v. NAIR*, 754 F.2d 1541 (9th Cir. 1985); *Sigales v. Lido Maritime Inc.*, 776 F.2d 1512 (11th Cir. 1985).

[4] *Rainbow Line v. TEQUILA*, 480 F.2d 1024 (2d Cir. 1973); *Cardinal Shipping Corp. v. SEISO MARU*, 744 F.2d 461 (5th Cir. 1984); *Gulf T&T Co. v. HOEGH SHIELD*, 658 F.2d 363 (5th Cir. 1981); *Gulf T&T Co. v. TENTO*, 694 F.2d 1191 (9th Cir. 1982).

Petition of K.S. Line (The SWIBON), 596 F. Supp. 1268 (D. Ark. 1984) and *Complaint of Geophysical Services, Inc.*, 590 F. Supp. 1346 (S.D. Tex. 1984). But the Second Circuit has applied the *Lauritzen* rules to a collision on the High Seas: *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448 (2d Cir. 1975) — and collisions are major instigators of limitation actions.

Lauritzen principles have also been extended in the Ninth Circuit to general maritime "forum non conveniens" questions: *Pereira v. Utah Transport, Inc.*, 764 F.2d 686 (9th Cir. 1985), *cert. den.*, 475 U.S. 1040 (1986) and, in a well-reasoned lower court case, to marine insurance: *Edinburgh Ass. Co. v. R.L. Burns Corp. (The GATTO SELVATICO)*, 479 F. Supp. 138 (C.D. Cal. 1979). A similar use of *Lauritzen* exists in *Thebes Shipping v. Ass. Ansonia*, 599 F. Supp. 405 (S.D. N.Y. 1984).

It is reasonable to say that *Lauritzen* is the predominant choice of law test, and is becoming the sole test. It was clearly the intention of this Court in *Romero* that it should always be considered in choice of law analysis.

The absolute rejection of the *Lauritzen* test by the Ninth Circuit is therefore incomprehensible. When, in *Lauritzen*, this Court approved the apparent rule of *The TITANIC*, the Court explained that, in 1914, "the application of the limitation on liability brought our practice into harmony with that of all other maritime nations" (345 U.S. at 592) suggesting that harmony was very much to be desired. But the rule of *The TITANIC* is no longer in harmony with *any* of the multitudinous Convention states: it is now a wholly isolated rule. The *Lauritzen* test has done more to continue the policy of harmony in admiralty than any other decision: its flat rejection by the Ninth Circuit in favor of *The TITANIC*

continues the anomaly that, in cargo limitation, the United States adheres to a unique and thoroughly disapproved system of fund calculation. In rejecting *Lauritzen*, the Ninth Circuit has rejected international harmony and that very policy as explicitly announced by this Court.

When extending the *Lauritzen* principles to general maritime law in *Romero*, the Court was careful to say:

> "We must apply those principles of choice of law that are consonant with the needs of a general federal maritime law and with due recognition of our self-regarding respect for the relevant interests of foreign nations in the regulation of maritime commerce as part of the legitimate concern of the international community."

Romero, 358 U.S. at 382-3, cited with approval in Official Comment, *Restatement of Conflicts of Law*, 2d § 145, p. 426 (1971).

Limitation of liability laws fall within this rubric, since they have two clearly national purposes: in furtherance of legitimate international trade the first is to encourage investment in shipping by limiting otherwise illimitable liability; the second is to provide a fund for the compensation of injured parties who had dealt with the nationally-licensed vessel.

These were the reasons the United States instituted its limitation act and why the *policy* of limitation, if not its anomalous applications, is to be liberally construed: *The PRINCESS SOPHIA*, 61 F.2d 339, 353 (9th Cir. 1932). Most maritime nations subscribe to one or other of the three Conventions: in applying their choice of law rules, their results will often be identical.

While the United States no longer has much of an investment in U.S.-flag merchant fleets, it is no secret that other nations have substantial fleets (and U.S. companies have substantial investments in "tonnage states" such as Panama and Liberia). Each of these foreign nations has a strong public policy interest in having a rational limitation fund applied to its vessels. In that analysis, the constitution of the fund is paramount: one cannot encourage investment in one's national shipping on the basis of limited liability if the amount of liability will change in each potential forum. Consistency is essential.

Similarly for the shipowner: we live in a world of multifarious laws, and peripatetic ships encounter more than their share. Each shipowner can expect to be subject to foreign "operational" laws of unpredictable ferocity; but the rigor and potentially disastrous financial consequences of these laws *must* be limitable — and consistently limitable if commercial shipping is to remain a viable enterprise. The only real way to do so is to allow some substantial weight to the limitation laws of the vessel's flag and other factors, and not simply to reject comparative analysis in favor of the domestic law of the forum.

Similarly, the cargo claimant has an interest in the application of predictable national limitation law. Windfalls are always welcome — but successful business relies on predictability and the rational application of objective rules. The rule of thumb that a ship is likely to carry its national limitation fund with it presents a modicum of predictability, and creates the foundation for a rational decision whether to employ a particular vessel for a particular task. The present U.S. rule which strips a ship of its inherent limitation fund, and substitutes the U.S. "residual value" fund that, in serious cases, is

invariably inadequate, is itself unreasonable, unpredictable and unattractive. The U.S., with its peculiar rules and anomalous funds, and being signatory to no Convention, lends itself to forum-shopping (*The TITANIC* is an exact case in point) simply because its rules are different. The use of *Lauritzen* rules, with their heavy emphasis on logical contacts, will minimize forum-shopping, and rationalize recoveries. The Ninth Circuit was wrong to reject *Lauritzen* analysis in limitation.

CONCLUSION

This Court should grant *certiorari* for the purposes of considering the extent to which the general maritime law rules of *Lauritzen v. Larsen* should be applied in limitation of liability cases.

Dated February 22, 1991

Respectfully submitted,

WILLIAMS WOOLLEY
COGSWELL NAKAZAWA & RUSSELL

DAVID E. R. WOOLLEY

Attorneys for Petitioner
KOREA SHIPPING CORP., LTD.

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In re: KOREA SHIPPING CORP., LTD., Now Known as HANJIN CONTAINER LINES, INC., Owner of the Korean Wonis One, For Exoneration From or Limitation of Liability.

KOREA SHIPPING CORP., LTD.,
Petitioner-Appellant,

v.

TOKIO MARINE & FIRE INSURANCE COMPANY, LTD., MALAYAN OVERSEAS INSURANCE COMPANY; VSI HARDWARE INDUSTRIES; SCHITECH MEDICAL PRODUCTS, INC.; MORRISON LINE, INC.; INTERNATIONAL CARGO & SURETY INSURANCE COMPANY; AMERICAN TRADING & PRODUCTION CORPORATION; NEWELL COMPANY; FIREMAN'S FUND INSURANCE COMPANY; ROCKWELL INTERNATIONAL; COMPASS INTERNATIONAL, INC.; JANKA, INC.; USA MAXAM, INC. dba Wholesale World; MIGHTY ENTERPRISES, INC.; WEITA INTERNATIONAL CORPORATION; ALL PACIFIC TRADING, INC.; THOMAS MONAHAN COMPANY; SUN INSURANCE COMPANY; GRE TALBOT; BIRD & COMPANY, as subrogor for RYDER INTERNATIONAL FREIGHT & CUSTOMS SERVICES AND COLLENZIONE EUROPE USA, INC.,

Nos. 89-56245;
89-55919

D.C. No.
CV-88-06160-HLH (Ex)

OPINION

CATHAY COMPANY, LTD.; TRAVELERS INDEMNITY COMPANY; ARCHE & COMPANY, LTD.; GREAT AMERICAN INSURANCE COMPANY; JEURO CONTAINER TRANSPORT USA, INC.; A.O.K. INTERNATIONAL, INC.; LEP INTERNATIONAL (FAR EAST), LTD.; AEMPAC SYSTEMS, INC.; AIDCAR COMPANY, LTD.; REGAL MANUFACTURING COMPANY; RECOVERY SERVICES INTERNATIONAL,
Claimants-Appellees.

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

Argued and Submitted
October 3, 1990—Pasadena, California

Filed November 26, 1990

Before: Harry Pregerson, Stephen Reinhardt and Cynthia Holcomb Hall, Circuit Judges.

Opinion by Judge Pregerson

SUMMARY

Insurance/Jurisdiction

Affirming a district court dismissal of an action for lack of jurisdiction, the court of appeals held that, in applying the higher liability limit under U.S. law for damage to cargo aboard a foreign ship, the district court correctly dismissed an

action seeking limitation of liability because the aggregate claims did not exceed the maximum statutory limit.

Appellant Korea Shipping Corp., Ltd., sought to limit its liability for damage to cargo headed to the U.S. aboard its ship. Parties with interest in the cargo filed claims for damages in U.S. courts. Korea Shipping and the claimants agreed that the Carriage of Goods by Sea Act (COGSA) governed the substantive liability of Korea Shipping for the cargo damages. The claims added up to about $1,200,000. Korea Shipping argued that although it was proceeding in a U.S. court using U.S. limitation procedures, it was entitled to limit its liability to the lower statutory limit of $420,000 under Korean law. The claimants asserted that Korea Shipping's liability should be fixed at the higher amount, the liability limit as determined under the Limitation of Liability Act (LLA)—the U.S. law of limitation. Agreeing that the higher U.S. limitation limit applied in this case, the district court dismissed the case for lack of jurisdiction. The court held that an action may be brought under U.S. limitation law only when the aggregate claims exceed the amount of the liability limit.

[1] A court hearing the limitation action must determine at the outset which country's limitation law governs the liability limit. [2] The court must then compare the amount of the limitation fund with the total amount of all the claims pending in the limitation action. If the claims do not exceed the limitation fund, then the court must dismiss the action. [3] The court agreed with the claimants that *Oceanic Steam Navigation Co. v. Mellor (The Titanic)* applied to limit Korea Shipping's liability. [4] The court disagreed that *The Norwalk Victory* governed and required a different result. [5] That case does not apply where American law governs the substantive liability of the parties. Here, the parties agreed that COGSA, a U.S. law of substantive liability, governed the rights of the parties. [6] Equally erroneous was Korea Shipping's assertion that a U.S. court must apply foreign limitation law, regardless of which country's substantive liability law applies, if it finds

that foreign limitation law is substantive and otherwise applicable under maritime choice-of-law analysis. [7] The district court correctly applied the higher liability limit under U.S. law. Because there was no need to limit Korea Shipping's liability, the district court properly dismissed the aciton.

COUNSEL

Williams, Wooley

David E.R. Wooley, Cogswell, Nakazawa & Russell, Long Beach, California, for the petitioner-appellant.

Joseph P. Tabrisky, Fisher & Porter, Long Beach, California, for Rockwell International, Newell Company, Compass International, Fireman's Fund Insurance Co., Tokio Marine & Fire Ins. Co., A.O.K. International, American Trading & Production Corporation, Scitech Medical Products, CTS Products, Malayan Overseas, Morrison Line, USA Maxam, VSI Hardware Industries, Shing Kong Fire & Marine Insurance Co., Ltd. and Janka, Inc., claimants-appellees.

Andrew B. Downs, Derby, Cook, Quinby & Tweedt, San Francisco, California, for All Pacific Trading, Inc. and Thomas Monahan Co., claimants-appellees.

OPINION

PREGERSON, Circuit Judge:

Korea Shipping Corp., Ltd. ("Korea Shipping") brought an action in the United States District Court to limit its liability for damage to cargo aboard its ship. The district court dismissed the action for lack of jurisdiction because the statutory liability limit of Korea Shipping as determined under United States limitation law exceeded the aggregate claims for the cargo damages. Korea Shipping appeals, and we affirm.

BACKGROUND

The facts are undisputed. Cargo headed to the U.S. aboard the Korea Wonis One, a ship owned by Korea Shipping, now known as Hanjin Container Lines, Inc., was damaged in Korean territorial waters. Parties with interest in the cargo filed claims for damages in U.S. courts. Korea Shipping and the claimants agree that the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C.A. App. §§ 1300-1315 (West 1975 & Supp. 1989), governs the substantive liability of Korea Shipping for the cargo damages. The claims add up to about $1,200,000.

Korea Shipping brought an action in the U.S. District Court to limit its liability for damages to the cargo.[1] Various maritime countries have limitation laws which allow the owners of ocean-going ships to limit their total liability for damage or loss of cargo arising from a single voyage to a statutory amount.[2] United States limitation law allows a foreign shipowner to limit its liability by bringing a limitation action in a U.S. court. Korea Shipping argued that, although it was proceeding in a U.S. court using U.S. limitation procedures, it was entitled to limit its liability to the lower statutory limit under Korean law. Korea Shipping reasoned that the liability limit under Korean law should apply to the action because U.S. maritime choice-of-law rules favored the application of Korean limitation law.[3] Korea Shipping contended that since Korean limitation law applied, its total liability from the acci-

[1]The law of liability limitation is different from the law of substantive liability. A law of substantive liability, of which COGSA is an example, creates or defines a party's liability; a law of liability limitation places an upper limit on a party's liability that has been created under a substantive law.

[2]The statutory limit differs among countries.

[3]To support its argument that Korean limitation law should apply, Korea Shipping pointed out that the damage was caused by a Korean crew aboard a Korean ship in Korean territorial waters.

dent should be limited to $420,000, the liability limit as determined under Korean limitation law. Under Korean limitation law, the statutory limit is derived from the tonnage of the ship.[4]

The claimants moved for summary judgment on the issue of the applicable liability limit. The claimants asserted that Korea Shipping's liability should be fixed at the higher amount of $1,320,000, the liability limit as determined under the Limitation of Liability Act ("LLA"), 46 U.S.C.A. App. §§ 181-189 (West 1958 & Supp. 1990) — the U.S. law of limitation. Under LLA, the liability limit equals the sum of the actual value of the shipowner's interest in the ship after damage is sustained[5] plus the freight charge owed the shipowner at the end of the voyage. The claimants argued that the maritime choice-of-law rule invoked by Korea Shipping does not apply to the question of which country's limitation law applies and that U.S. courts must determine the liability limit using U.S. limitation law.

The district court agreed with the claimants and held that the higher U.S. limitation limit applies here. The court then dismissed the case for lack of jurisdiction, because an action may be brought under U.S. limitation law only when the aggregate claims *exceed* the amount of the liability limit. When the aggregate amount of the claims against the shipowner is less than the applicable liability limit, all the claims can be paid in full and there is no need to "limit" the shipowner's liability.

Korea Shipping appeals, asserting that the liability limit should be determined by Korean limitation law and that, in that case, the liability limit would be *less* than the aggregate

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[4] *In re K.S. Line Corp. (The M/V Swibon)*, 596 F.Supp. 1268, 1269-70 (D.Alaska 1984).

[5] *See Norwich & New York Transp. Co. v. Wright*, 80 U.S. (13 Wall.) 104, 127 (1872).

claims, providing a continued need for supervision by the court.

DISCUSSION

A. Limitation Proceedings

A foreign shipowner may initiate a limitation action under LLA in a U.S. court by depositing with the court a limitation fund equal to the amount of the liability limit under LLA:[6] the value of the ship plus the pending freight owed. Once the shipowner files a petition under LLA, all actions against the ship or the shipowner in U.S. courts are enjoined,[7] and all parties seeking to recover from the shipowner must file their claims in the limitation proceeding.

[1] At the outset, the court hearing the limitation action must determine which country's limitation law governs the liability limit. *Black Diamond S.S. Corp. v. Robert Stewart & Sons, Ltd. (The Norwalk Victory)*, 336 U.S. 386, 397-98 (1949). If the court determines that foreign limitation law controls the liability limit, the limitation fund filed with the court is adjusted accordingly. If the court determines that U.S. law controls the liability limit, then the limitation fund deposited under LLA stays the same.

[2] The court must then compare the amount of the limitation fund with the total amount of all the claims pending in the limitation action. If the aggregate of all the claims exceeds the limitation fund, then the fund is divided proportionately among the claimants.[8] If, however, the claims do not exceed

[6]Supplemental Rule F(1), Fed. R. Civ. P., 28 U.S.C.A. (West 1970).

[7]46 U.S.C.A. § 185; Supplemental Rule F(3), Fed. R. Civ. P., 28 U.S.C.A. (West 1970).

[8]The injunction and the limitation decree do not have extraterritorial effect and do not enjoin or limit the rights of the parties who choose to pursue their claims in foreign courts. *In re Bowoon Sangsa Co., Ltd. (The M/T Bowoon)*, 720 F.2d 595, 599 (9th Cir. 1983).

the limitation fund, then the court must dismiss the action. *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 151-152 (1957); *The Norwalk Victory*, 336 U.S. at 393. This rule reflects the logical proposition that the courts need not adjudicate and apportion a limited fund among claims when the claims, paid in full, would not add up to the liability limit.[9] Each claimant is then free to pursue its claim in any appropriate forum.

B. Analysis

The dispute in the present case arises because the parties disagree as to which country's limitation law controls Korea Shipping's liability limit. A grant of summary judgment is reviewed de novo. *Kruso v. International Telephone & Telegraph Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989). If U.S. limitation law determines the limit, then the district court properly dismissed the action because the claims would not exceed the liability limit under LLA. If Korean limitation law controls, then the action should be reinstated because the aggregate of the claims would exceed the liability limit under Korean limitation law.

[3] The claimants base their argument that U.S. limitation law applies on *Oceanic Steam Navigation Co. v. Mellor (The Titanic)*, 233 U.S. 718 (1914). The Titanic, a British steamship, hit an iceberg on the high seas and sank with the loss of many lives and the total loss of vessel and cargo. The owners of The Titanic sought to limit their liability to the liability limit provided by U.S. law.[10] The Supreme Court held that,

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[9]The primary purpose of a limitation proceeding is "apportioning the limitation fund among the claimants where that fund was inadequate to pay the claims in full." *Lake Tankers Corp.*, 354 U.S. at 153. The consolidation of all the claims, while convenient for the petitioner, does not justify a limitation action when the claims do not add up to the limit. *Id.*

[10]Because, under U.S. law, the value of the vessel is determined after the accident, the U.S. liability limit was minuscule. In contrast, the liability limit under British law, which was based on the tonnage of the vessel, would have provided a much larger fund.

because U.S. limitation law is procedural, the courts must apply U.S. limitation law in limitation proceedings brought in U.S. courts, even when the substantive law governing the parties' liabilities is foreign. 233 U.S. at 733.

[4] It is clear that, under *The Titanic*, Korea Shipping's liability limit should be $1,320,000, the amount determined under LLA. Korea Shipping contends that a more recent Supreme Court case, *The Norwalk Victory*, 336 U.S. 386 (1949), governs and requires a different result. Korea Shipping, however, is mistaken.

In *The Norwalk Victory*, the petitioner sought to limit its liability in U.S. courts for claims arising from a collision of its ship with a British ship in Belgian territorial waters. It was undisputed that Belgian law governed the substantive rights of the parties. The petitioner wanted to limit its liability to the limit provided under Belgian law.[11] The Court, reexamining *The Titanic*, ruled that the courts must apply foreign limitation law if the substantive liability of the parties is governed by a foreign law *and* if the limitation law of the foreign country is such an integral part of the substantive law governing the action that it can be said to "attach" to the substantive liability law. 336 U.S. at 395. In such cases, the foreign limitation law is deemed to be "substantive" and U.S. courts must apply the foreign limitation law along with the foreign substantive law of liability. If either of the two conditions is not met, then U.S. courts apply the rule in *The Titanic*: U.S. limitation law controls.

[5] *The Norwalk Victory* does not apply here. The parties have agreed that COGSA, a U.S. law of substantive liability, governs the rights of the parties. There is no need to go further

[11] In *The Norwalk Victory*, in contrast to *The Titanic*, the foreign limitation law would have provided for a lower liability limit than under U.S. law because the petitioner's ship did not sink and had a greater value than the liability limit under the Belgian limitation law. *See* 336 U.S. at 389-91.

to see if Korean limitation law "attaches" to the law of substantive liability, because there is no substantive Korean liability law to which Korean limitation law could attach. Our conclusion is consistent with our decision in *In re Bowoon Sangsa Co. (The M/T Bowoon)*, 720 F.2d 595 (9th Cir. 1983). There we noted that *The Norwalk Victory* does not apply where American law governs the substantive liability of the parties. 720 F.2d at 599 n.5.

Korea Shipping argues that, while *The Titanic* may be used to *decrease* the shipowner's liability limit when LLA dictates a lower limit than does foreign limitation law, it may not be used to *increase* the limit when LLA dictates a higher limit. While it is true that in *The Titanic*, applying U.S. limitation law resulted in a lower limit than under foreign limitation law, the Court did not limit its decision to that situation alone. In fact, the Court anticipated that one of the effects of its holding could be that an owner of a vessel seeking to limit its liability in a foreign court might have to pay *more* than it would have in its home jurisdiction:

> [It] is conceivable that, if [an owner] sought the advantage of an alien law, it might as a condition have to pay more than its liability under the law of its flag in some cases. But the imagining of such possible difficult[y] is no sufficient reason for not applying the statute as it has been construed, on the whole, it would seem, with good effect.

233 U.S. at 734. The above passage indicates that the Court anticipated that, under its holding in *The Titanic*, U.S. courts would have to apply U.S. limitation law whether or not the amount of the limitation fund would be greater under U.S. law than under foreign law.

[6] Equally erroneous is Korea Shipping's assertion that *The Norwalk Victory* held that a U.S. court must apply foreign limitation law, regardless of which country's substantive lia-

bility law applies, if it finds that foreign limitation law is substantive and otherwise applicable under maritime choice-of-law analysis. It is true that the Court in *The Norwalk Victory* discussed the issue in terms of whether the foreign limitation law could be deemed procedural or substantive. *See* 336 U.S. at 395-96. But, in the present context, it is nonsensical to debate whether Korean limitation law is substantive. "Substantive" as applied to limitation law is a term of art. As *The Norwalk Victory* made clear, the term refers to cases where foreign limitation law is an integral part of the foreign substantive law of liability so that the limit can be said to "attach" to the substantive liability. *Id.* The present case is not governed by Korean law of substantive liability to which Korean limitation law can "attach." The district court therefore properly refused to decide whether, in the abstract, Korean limitation law is substantive.

Korea Shipping cites *In re K.S. Line Corp. (The M/V Swibon),* 596 F.Supp. 1268 (D.Alaska 1984), as holding that Korean limitation law is substantive within the meaning of *The Norwalk Victory,* but the facts in that case were different. In *The M/V Swibon,* the parties agreed that Korean law controlled the underlying substantive liability. 596 F.Supp. at 1272 n.6. It was thus appropriate and necessary for the district court to determine whether Korean limitation law was substantive. As noted earlier, without Korean substantive law, we need not even get into *The Norwalk Victory* analysis.

Korea Shipping's argument that the court adopt the maritime choice-of-law test in *Lauritzen v. Larsen,*[12] 345 U.S. 571

[12]In *Lauritzen,* the Supreme Court set forth the following factors to be considered in deciding which country's law governs a maritime tort claim: the place of the wrongful act, the law of the flag, the allegiance or domicile of the injured party, the allegiance of the shipowner, the place of contract, the inaccessibility of a foreign forum, and the law of the forum. 345 U.S. at 583-91. In *Hellenic Lines Std. v. Rhoditis,* 398 U.S. 306 (1970), the Court added an additional factor: the shipowner's base of operations. In *Romero v. International Terminal Operating Co.,* 358 U.S. 354 (1959), the Court extended the *Lauritzen* factors to choice-of-law issues in general maritime cases.

(1953), in choosing the liability limitation law is also unpersuasive. *Lauritzen* dealt with the choice of the applicable substantive law of liability; that issue is not raised here because the parties have stipulated that U.S. law governs the substantive liability of Korea Shipping. The Court in *Lauritzen* specifically recognized that limitation cases were an exception to the choice-of-law analysis in *Lauritzen* and left undisturbed the rule governing limitation cases as established in *The Titanic*. 345 U.S. at 591-92.

Korea Shipping argues that the court in *The M/V Swibon* adopted the *Lauritzen* test to determine whether to apply a foreign limitation law in a U.S. limitation proceeding. However, in *The M/V Swibon*, it had been determined that Korean law controlled the underlying substantive rights of the parties, and the court applied the *Lauritzen* test only to the extent that questions existed whether the Korean limitation attached to the rights.[13] 596 F.Supp. at 1274. In fact, the court in *The M/V Swibon* specifically rejected the argument, raised again here, that the courts should apply the *Lauritzen* test to determine the applicable limitation law. 596 F.Supp. at 1270-71.

CONCLUSION

[7] Under *The Norwalk Victory*, our courts must apply foreign limitation law only if foreign substantive law governs the underlying liability of the parties *and* foreign limitation law attaches to the foreign substantive law. In all other cases, under *The Titanic*, the courts must apply U.S. limitation law to limitation proceedings brought in U.S. courts. Here, because the parties have agreed that U.S. substantive law controls the substantive liabilities of the parties, *The Norwalk Victory* is inapplicable. The district court therefore correctly

[13]This application of the *Lauritzen* test was not only superfluous to the conclusion reached in *The M/V Swibon* but also contrary to the rule set forth in *The Titanic* and *The Norwalk Victory*.

applied the higher liability limit under U.S. law. Because there was no need to limit Korea Shipping's liability, the district court properly dismissed the action.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES — GENERAL

ENTERED
AUG 8 1989
Clerk, U.S. District Court
Central District of California
By Deputy

Case No. CV 88 - 6160 - HLH Date August 7, 1989

Title In the matter of Korea Shipping Corporation, Ltd. (the Korea Wonis One).

DOCKET ENTRY

PRESENT:

HON. HARRY L. HUPP, JUDGE

Robert Bolton	Cynthia Worthen-Lewis
Deputy Clerk	Court Reporter (ESR)

ATTORNEYS PRESENT FOR PLAINTIFFS:
David Woolley

ATTORNEYS PRESENT FOR DEFENDANTS:

Joseph Tabrisky	Russell Robins
Andrew Downs	John Chang
Ed Cohan	Neil Lerner
F. Brucculer	
Robin Kurtz	

PROCEEDINGS: MOTIONS BY CLAIMANTS FOR PARTIAL SUMMARY JUDGMENT (PACKAGE LIMIT; CHOICE OF LAW)

ORDER (also, if applicable, findings and memorandum opinion):

The motion for summary judgment as to choice of limitations law is granted, the court determining that the limitations law of the United States applies to this case. It being conceded by plaintiff that the value of the ship exceeds the claims for cargo damage, there is no jurisdiction for a limitation proceeding. The injunction against maintaining actions against the plaintiff or the ship is dissolved and the action is dismissed. The court does not reach the question of "package limitation".

The facts as they pertain to this motion are undisputed: The Korean Wonis One, a container ship owned by Korea Shipping Corp. (now Hanjin Container Lines), suffered an incursion of seawater into one of its holds while in Pusan, Korea. In that hold was cargo in containers originating in Taiwan, Hong Kong, and Singapore, and destined for Los Angeles. The cargo was damaged by seawater. Plaintiff, maintaining that the vessel owner was not negligent, has sued for limitation of liability under 46 USC §183(a), 185. The court set a required bond, set a date for filing of claims, and enjoined other suits against plaintiff (except in the courts of Korea). Numerous claims have been filed, totaling approximately $1,200,000. The value of the ship after the casualty exceeds the amount of the claims. However, if Korean limitations rules apply, the limitation is governed by a formula based on the tonnage of the ship and the limitation would be approximately $400,000.* The claimants consist of shippers, consignees, shipper's insurers subrogating to the shipper's rights, and non-vessel owning common carriers (NVOCCs), who consolidated cargo of shippers in containers

* This approach to limitations is not as unfair as the facts of this case might imply; if the ship had sunk, there would be no recovery under U.S. limitations law, but an approximate one-third recovery under Korean law. See the result of *The Titanic*, cited below.

and issued their own bills of lading. (If the action continues, the court must decide numerous questions resulting from this circumstance: whether a shipper through an NVOCC may maintain its own action against the vessel, whether the container of the NVOCC is a single package no matter how many shipper's goods are contained in it, whose bill of lading contains the provisions which govern liability, etc.).

It is immediately apparent that if U.S. limitations rules apply, there is no need for a limitation proceeding, since the value of the ship substantially exceeds the claims for cargo damage. In that case, the court should dismiss the limitation suit and allow the cargo claimants to pursue their claims in whatever fora they choose (presumably including this one). However, if Korean limitations law applies, then this proceeding is necessary to establish the amount of the claims and apportion the available fund among the claimants.

The court determines that U.S. limitation law applies. The basic rule was stated in *Oceanic Steam Navigation Co. v. Mellor (The Titanic)* (1914) 233 US 714, 58 LEd 1171, and is that U.S. courts apply U.S. limitation of liability law in all cases pending therein. The rule comes from a concept, perhaps now considered quaint, that a limitations proceeding is a procedural proceeding, and thus the law of the forum invariably governs. An exception has developed to the rule, and plaintiff relies on the exception as the basis for the action. The exception is contained in *Black Diamond Steamship Corp. v. Robert Stewart & Sons (The Norwalk Victory)* (1949) 336 US 386, 93 LEd 754 and provides for the application of foreign limitations law when 2 conditions exist: 1. when foreign substantive law controls liability questions, and 2. when that foreign substantive liability has contained within it the limitation rules which condition the result under the substantive law. This was put in language which 40 years later seems antiquated — that the foreign limitations rule applies only where it "attaches" to governing foreign substantive law. If the conditions are not met, the

rule of *The Titanic* applies. Perhaps the language of older legal generations is difficult to follow because law schools have been busy teaching the eradication of the difference between substantive and procedural rules for the 40 years since *The Norwalk Victory*, but the meaning is unmistakable. However, the above interpretation of *The Norwalk Victory* is not the one man reading of this court; it was adopted by the 9th Circuit in *Matter of Bowoon Sangsa Co, Ltd.* (9Cir. 1983) 720 F2d 595, 599 fnt 5. Therein, the court makes it unmistakably clear that the doctrine of *The Norwalk Victory* does not apply when U.S. substantive law governs the relationship between shipper and vessel. As all parties here acknowledge, by reason of COGSA and the express terms of the bills of lading, U.S. substantive law governs liability questions. It follows that U.S. limitations rules apply also. Plaintiff argues that limitations rules are substantive and the application of the same depends on factors other than the rules governing the relationship between shipper and vessel. Perhaps under modern conflicts-of-law theory, a decent argument could be made for this result, but it is not the result required by *The Titanic* and *The Norwalk Victory*, which govern. Plaintiff cites the opinion in *Matter of KS Line Corp.* (DAk 1984) 596 FSupp 1268, but the fact situation there was different. It was determined that Korean substantive law applied and, on finding that the Korean limitations rules conditioned Korean substantive rules on recovery, the doctrine of *The Norwalk Victory* was properly applicable. Here, COGSA provides that U.S. substantive law applies, and, based thereon, so do the bills of lading.

With this result, the limitations suit must be dismissed and the claimants relegated to asserting their own claims against plaintiff in their desired fora. Claimants filing suit in the Central District should file a notice of related case. The other matters presented are moot and are not decided. This minute order is the order disposing of this action and is final for purposes of Rule 54. No more formal document is needed.

In dismissing the suit, the court reserves jurisdiction to reopen in the event that additional facts make it apparent that the amount of claims exceed the value of the ship.

No written opinion will be filed, since the court believes it is not making any new law, but merely following the established 9th Circuit authority interpreting the limited exception found in *The Norwalk Victory* such that it does not apply in this case. In any event, the court does not have the time to write a published opinion.

This dismissal of this case also carries with it the dismissal of all Third Party claims and all Cross Claims, there being no jurisdiction once the limitation proceeding is dismissed.

The bond previously filed by plaintiff shall continue in effect until time to file an appeal has lapsed, and, if an appeal is filed, shall continue in effect until final appellate decision. Unless otherwise enjoined by the Court of Appeals, claimants have 90 days within which to file actions against plaintiff.

(ENT. _____) JS-6
ISSD COPIES TO ALL COUNSEL:

No. 90-1329

Supreme Court, U.S.
FILED
MAR 25 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

In re: KOREA SHIPPING CORP., LTD.,
Now Known as HANJIN CONTAINER LINES, INC.,
Owner of the Korean Wonis One, For Exoneration
From or Limitation of Liability

KOREA SHIPPING CORP., LTD.,

Petitioner,

vs.

TOKIO MARINE & FIRE INSURANCE COMPANY, LTD.;
(Additional Respondents continued on reverse side.)

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

18 pp

Additional Respondents:

MALAYAN OVERSEAS INSURANCE COMPANY; VSI HARDWARE INDUSTRIES; SCITECH MEDICAL PRODUCTS, INC.; MORRISON LINE, INC.; INTERNATIONAL CARGO & SURETY INSURANCE COMPANY; AMERICAN TRADING & PRODUCTS CORPORATION; NEWELL COMPANY; FIREMAN'S FUND INSURANCE COMPANY; ROCKWELL INTERNATIONAL; COMPASS INTERNATIONAL, INC.; JANKA, INC.; USA MAXAM, INC. dba WHOLESALE WORLD; MIGHTY ENTERPRISES, INC.; WEITA INTERNATIONAL CORPORATION; ALL PACIFIC TRADING, INC.; THOMAS MONAHAN COMPANY; SUN INSURANCE COMPANY; GRE TALBOT; BIRD & COMPANY, as subrogor for RYDER FREIGHT & CUSTOMS SERVICES AND COLLENZIONE EUROPE USA, INC.; CATHAY COMPANY, LTD.; TRAVELERS INDEMNITY COMPANY; ARCHE & COMPANY, LTD.; GREAT AMERICAN INSURANCE COMPANY; JEURO CONTAINER TRANSPORT USA, INC.; A.O.K. INTERNATIONAL, INC.; LEP INTERNATIONAL (FAR EAST), LTD.; AEMPAC SYSTEMS, INC.; AIDCAR COMPANY, LTD.; REGAL MANUFACTURING COMPANY; RECOVERY SERVICES INTERNATIONAL

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QUESTION PRESENTED

Is the recovery fund under the maritime law of limitation of liability now to be chosen by reference to the choice of law principles set out in *Lauritzen v. Larsen*, 345 U.S. 571 (1953).

PARTIES TO THE PROCEEDING

Rule 29.1 List Of Parent And Subsidiary Companies

The undersigned counsel are unaware of any subsidiaries of their clients other than wholly owned subsidiaries.

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Rules

Supreme Court Rule 13.1. 2

No. 90-1329

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

In re: KOREA SHIPPING CORP., LTD.,
Now Known as HANJIN CONTAINER LINES, INC.,
Owner of the Korean Wonis One, For Exoneration
From or Limitation of Liability

KOREA SHIPPING CORP., LTD.,

Petitioner,

vs.

TOKIO MARINE & FIRE INSURANCE COMPANY, LTD.; MALAYAN OVERSEAS INSURANCE COMPANY; VSI HARDWARE INDUSTRIES; SCITECH MEDICAL PRODUCTS, INC.; MORRISON LINE, INC.; INTERNATIONAL CARGO & SURETY INSURANCE COMPANY; AMERICAN TRADING & PRODUCTS CORPORATION; NEWELL COMPANY; FIREMAN'S FUND INSURANCE COMPANY; ROCKWELL INTERNATIONAL; COMPASS INTERNATIONAL, INC.; JANKA, INC.; USA MAXAM, INC. dba WHOLESALE WORLD; MIGHTY ENTERPRISES, INC.; WEITA INTERNATIONAL CORPORATION; ALL PACIFIC TRADING, INC.; THOMAS MONAHAN COMPANY; SUN INSURANCE COMPANY; GRE TALBOT; BIRD & COMPANY, as subrogor for RYDER FREIGHT & CUSTOMS SERVICES AND COLLENZIONE EUROPE USA, INC.; CATHAY COMPANY, LTD.; TRAVELERS INDEMNITY COMPANY; ARCHE & COMPANY, LTD.; GREAT AMERICAN INSURANCE COMPANY; JEURO CONTAINER

TRANSPORT USA, INC.; A.O.K. INTERNATIONAL, INC.; LEP INTERNATIONAL (FAR EAST), LTD.; AEMPAC SYSTEMS, INC.; AIDCAR COMPANY, LTD.; REGAL MANUFACTURING COMPANY; RECOVERY SERVICES INTERNATIONAL

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 919 F.2d 601 (9th Cir. 1990), and is attached as Appendix A to petitioner's petition.

The order of the District Court is reported at 1990 A.M.C. 190 (C.D. Cal. 1989) and is attached as Appendix B to petitioner's petition.

JURISDICTION

Respondents agree with petitioner's statement of jurisdiction except to note that the petition is timely under Supreme Court Rule 13.1.

STATEMENT OF THE CASE

Petitioner, Korea Shipping Corp., Ltd. was the owner and operator of the containership KOREAN WONIS ONE. Petitioner was carrying cargo from various non-Korean far east ports to Los Angeles. Approximately forty containers of cargo bound for Los Angeles and other United States destinations were damaged by water while on board the KOREAN WONIS ONE in Korean waters. The damaged cargo was discharged from the KOREAN WONIS ONE in Los Angeles and was delivered to the consignees in the United States.

Petitioner filed an action in the United States District Court for the Central District of California to limit its liability under 46 U.S.C. App. § 183. The minimum value of the vessel and freight then pending was approximately $1,320,000. Claims totaling less than that sum were filed.

The liabilities which petitioner sought to limit were for damage to cargo carried by sea in international commerce. The parties agreed in the District Court that those liabilities were governed by the United States Carriage Of Goods By Sea Act ("U.S. COGSA"), 46 U.S.C. App. § 1300 *et. seq.*

The District Court dismissed the limitation action for lack of jurisdiction because an action may be brought under United States limitation law only when the total claims asserted exceed the value of the vessel. The District Court held that the amount to which liability could be limited was determined by United States law, not the law of South Korea since United States law governed the substantive rights and liabilities of the parties.

The Court of Appeals for the Ninth Circuit affirmed. It held that under *Oceanic Steam Navigation Company v. Mellor (The TITANIC)*, 233 U.S. 718 (1914) United States law governed the size of the limitation fund where the liabilities sought to be limited were created and governed by United States law. The Ninth Circuit held that no choice of law issue was presented because the parties had stipulated that U.S. COGSA governed petitioner's substantive liability.

INTRODUCTION

Certiorari should be denied. Petitioner seeks review on the ground that the opinion of the Ninth Circuit conflicts with the choice of law rules set forth in *Lauritzen v. Larsen*, 345 U.S. 571 (1953). There is no conflict. This case presents no choice of law issue, thus *Lauritzen* does not apply. The parties agree that by statutory mandate as well as contractual choice, their substantive rights and liabilities are governed by the United States Carriage of Goods by Sea Act ("U.S. COGSA"), 46 U.S.C. App. §§ 1300-1315. Petitioner further seeks to conduct a second choice of law determination, something not only neither required

nor suggested by *Lauritzen*, but also not authorized by the language of the limitation statute at issue..

Maritime limitation of liability law in the United States is statutory. It is contained in the Limitation of Liability Act, 46 U.S.C. App. §§ 183-189. Petitioner's policy goal of bringing U.S. Limitation law into conformity with the maritime law of other nations requires legislative action. Without legislative action, even approaching such a policy result would require ignoring the plain language of the statute as well as overruling *Oceanic Steam Navigation Company v. Mellor (The TITANIC)*, 233 U.S. 718 (1914), steps which are not necessary to a ruling in this matter. Thus, even if petitioner's policy argument were attractive to the Court, the record in this case does not provide the necessary basis for such a decision.

Petitioner's belief that this is a choice of law case is the result of a misunderstanding of *Black Diamond Steamship Corporation v. Robert Stewart & Sons (The NORWALK VICTORY)*, 336 U.S. 386 (1949). In its opinion in this matter,[1] the Ninth Circuit provided the best explanation of the effect and operation of *Black Diamond* to have been given by any lower court. The issues being litigated in this matter are raised infrequently. The Ninth Circuit's opinion was only the ninth reported decision since *Black Diamond* to consider these issues.[2] While the issues are important to the parties, they are relatively unimportant to the large scale development of admiralty law.

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[1] *In Re Korea Shipping Corp., Ltd.*, 919 F.2d 601 (9th Cir. 1990).

[2] The others are: *Accinanto v. Cosmopolitan Shipping Co.*, 100 F. Supp. 826 (D. Md. 1951); *Petition of Chadade Steamship Co.*, 266 F. Supp. 517 (S.D. Fla. 1967); *Complaint of Ta Chi Navigation (Panama) Corp. S.A.*, 416 F. Supp. 371 (S.D.N.Y. 1976); *Matter of Bethlehem Steel Corp.*, 631 F.2d 441 (6th Cir. 1980) and 435 F. Supp. 944 (N.D. Ohio 1976); *Matter of Bowoon Sangsa Co., Ltd.*, 720 F.2d 595 (9th Cir. 1983); *Complaint of Geophysical Service, Inc.*, 590 F. Supp. 1346 (S.D. Tex. 1984); and *Complaint of K.S. Line Corp.*, 596 F. Supp. 1268 (D. Alaska 1984).

REASONS FOR DENYING THE PETITION

1. There Is No Conflict With Lauritzen.

Petitioner seeks to limit its liability under the Limitation of Liability Act, 46 U.S.C. App. §§ 183-189. Petitioner wishes to enforce all the provisions of that Act except for those which set the amount of the limitation fund. There, petitioner would import the law of South Korea to set the limitation fund at a sum lower than that set by the Limitation Act. No Supreme Court decision authorizes such a procedure.

Ever since *The SCOTLAND*, 105 U.S. 24 (1882), the Limitation Act has applied to foreign flag vessels. *Oceanic Steam Navigation Company v. Mellor*, *supra* which resulted from the sinking of the TITANIC, held that in an action under the U.S. Limitation Act, the amount to which liability would be limited could not be greater than the amount specified by the U.S. Limitation Act even if the law of the vessel's flag permitted a greater liability. 233 U.S. at 733.

Oceanic Steam remains the law today. It was not changed by the widely misunderstood decision in *Black Diamond Steamship Corp. v. Robert Stewart & Sons*, *supra*. *Black Diamond* held simply that the U.S. Limitation Act could not operate to expand a right of recovery created by foreign law which provided for only limited damages. *Black Diamond* was not a *choice* of law decision. The law (Belgian law there) had been chosen. The issue was what were the boundaries of the chosen Belgian law.

Black Diamond stemmed from a ship collision in Belgian territorial waters. The owner and charterer of the NORWALK VICTORY filed a limitation action in the United States. The NORWALK VICTORY interests failed to post a bond for the full amount of their potential liability under the U.S. Limitation Act. Instead, they contended that they were entitled to rely upon the limitation law of Belgium, the Limitation Convention of 1924. Liability under Belgian limitation law was lower than that under U.S. Law. The District Court dismissed the limitation petition because the charterer failed to post the amount of security required by the U.S. Limitation Act. The Second Circuit affirmed.

The Supreme Court held that security had to be posted in the amount required by the U.S. Limitation Act, but reversed and remanded to permit the charterer an opportunity to post that security. 336 U.S. at 394-395. The Court then discussed whether the Belgian limitation law could ever be applied in a U.S. limitation action. The Court stated:

> On this point we agree with the Court of Appeals -- and disagree with the District Court -- that if, indeed, the Belgian limitation attaches to the right, then nothing in *Oceanic Steam Nav. Co. v. Mellor (THE TITANIC)* [citation] stands in the way of observing that limitation. The Court in that case was dealing with "a liability assumed already to exist on other grounds." [citations] But if it is the law of Belgium that the wrong creates no greater liability than that recognized by the Convention of 1924, we cannot, without more, regard our own statutes as expanding the right to recover.
>
> 336 U.S. at 395-396.

The Court continued:

> If, on the other hand, the Convention merely provides procedural machinery by which claims otherwise created are brought into concourse and scaled down to their proportionate share of a limited fund, we would respect the equally well settled principle that the forum is not governed by foreign rules of procedure.
>
> 336 U.S. at 396.

Black Diamond stands for the proposition that a cause of action governed by foreign law can only be enforced to the extent that it exists under foreign law. Thus, the U.S.

Limitation Act cannot be used to expand a right of recovery which only exists in a limited form. If normal choice of law rules established that a cause of action was governed by foreign law (as was the case in *Black Diamond*), then all of the substantive foreign law which created and defined that cause of action must be applied. *Black Diamond* did not hold that the U.S. courts should apply a foreign limitation law whenever that law was part of the substantive law of the foreign country. In this manner, *Black Diamond* was really not a choice of law decision. Rather, its goal was to find the boundaries of the applicable foreign law.

Lauritzen did not affect the holding in *Black Diamond*. It established general choice of law rules for use in maritime tort actions. The *Lauritzen* opinion recognized that legislative dictates on choice of law issues prevailed over general choice of law rules. 345 U.S. at 579 n. 7. It also recognized the general enforceability of contractual choice of law provisions. 345 U.S. at 588-589. Here, by its own terms, U.S. COGSA governs the rights and liabilities of the parties. 46 U.S.C. App. § 1312. In addition, petitioner's bills of lading provide for the application of U.S. COGSA. In the District Court, and before the Court of Appeals, the litigants agreed that U.S. COGSA governed. That being so, there is no choice of law determination to be made and *Lauritzen v. Larsen* does not apply to this dispute.

2. A Second Choice Of Law Determination Need Not Be Made.

The critical failure in petitioner's argument is the assumption that there is any role for choice of law analysis in limitation of liability proceedings. There is none.

The Limitation Act provides:

> The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter, or thing, loss, damage, or

> forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.
>
> 46 U.S.C. App. § 183(a).

In *Oceanic Steam*, Mr. Justice Holmes read the Act to mean what it said. He explained:

> It is true that the foundation for a recovery upon a British tort is an obligation created by British law. But it also is true that the laws of the forum may decline altogether to enforce that obligation on the ground that it is contrary to the domestic policy, or may decline to enforce it except within such limits as it may impose. [citations] It is competent, therefore, for Congress to enact that in certain matters belonging to admiralty jurisdiction parties resorting to our courts shall recover only to such extent or in such way as it may mark out.
>
> 233 U.S. at 732. (quoted in *Lauritzen v. Larsen*, 345 U.S. at 591, n. 27.)

The only "choice of law analysis" contemplated by either *Oceanic Steam* or *Black Diamond* is that which determines which nation's law creates and governs the causes of action and defenses at issue.

Both *Black Diamond* and *Oceanic Steam* recognize that any choice of limitation law has already been made by Congress. It is for that reason that the Court in *Black Diamond* focused on whether the Belgian limitation "attached to the right" of recovery so that only a limited right was available to be enforced in any court. In *Oceanic Steam*, the Court was more direct. It stated:

> For on what ground was the limitation of liability allowed in The Scotland or La Bourgogne?[3] Not on their being subject to the act of Congress or any law of the United States in their conduct, but if not on that ground, then it must have been because our statute permits a foreign vessel to limit its liability according to the act when sued in the United States.
>
> 233 U.S. at 733.

It is one thing for the courts to take the step contemplated in *Black Diamond* and apply foreign law to enforce the rights created by foreign law only to the extent that they exist. It is another to take the step contemplated by petitioner and apply foreign limitation law to rights which the parties agree are created and governed by U.S. law.

Limitation is a statutory right. As petitioner notes, it does not exist in the general maritime law.[4] Petitioner does not seek to apply the limitation law of South Korea to determine whether it is entitled to limit its liability. For that area, petitioner uses the U.S. Limitation Act and its requirement that the vessel owner not have "privity" or "knowledge" of the cause of the loss. Petitioner only seeks to apply South Korean law to set the financial limit of its liability.

From a choice of law perspective, petitioner's position makes little sense. If there is to be choice of law in limitation, why limit that choice of law to the limitation amount? Why not also incorporate South Korean law to determine whether petitioner has the right to limit its liability?

Even if the plain language of the Limitation Act did not need to be ignored to proceed as petitioner desires, judicial efficiency, fairness and predictability are simply not served

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[3] *Deslions v. La Compagnie Generale Transatlantique*, 210 U.S. 95 (1908).

[4] Petition For Writ Of Certiorari, p. 5.

by conducting a second choice of law analysis for limitation of liability. Choice of law principles, be they statutory mandate (U.S. COGSA), contractual choice (petitioner's bill of lading) or *Lauritzen v. Larsen* do need to be applied to determine which nation's law creates and governs the causes of action and defenses. Once that choice of law determination has been made, requiring a second choice of law decision in connection with a statutory limitation of liability action would simply require more judicial effort; make results less predictable; and encourage more litigation and more appeals. A second choice of law determination is unnecessary and unjustified.

3. U.S. COGSA's Limitation Exception Does Not Create A Separate Rule For U.S. COGSA Claims.

The Ninth Circuit did not discuss section 8 of U.S. COGSA, 46 U.S.C. App. § 1308 because it has no bearing on this dispute.[5] That section preserves the vessel owner's right to petition for limitation of its liability. It says nothing about choice of law. The relevance of U.S. COGSA's application is that it means that the *Black Diamond* exception does not apply. Section 8 of U.S. COGSA does not give the vessel owner seeking to limit U.S. COGSA liabilities any greater rights than those of any other vessel owner seeking to limit its liability.

CONCLUSION

Petitioner argues that United States limitation law is out of step with the law of other maritime nations. It also argues that U.S. law provides for an inadequate recovery in

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[5]Section 8 provides: "The provisions of this chapter shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916, or under the provisions of sections 175, 181 to 183, and 183b to 188 of this title or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels."

some situations. If so, that is because Congress has not seen fit to amend the statute. Petitioner has asked for review so that the Court can, on an inadequate record, make amends for Congress' failure to amend the statute.

There is not now, nor has there ever been, authority, justification or a need to require two separate levels of choice of law analysis in statutory limitation of liability actions. The only relevant choice of law to be made is the determination of which nation's law governs the causes of action and defenses asserted by the litigants. For that choice of law determination, *Lauritzen v. Larsen* governs in tort claims where there is no statutory mandate or contractual choice. Here, there is agreement by the parties that by both statutory mandate and contractual choice, United States law applies. Therefore, *Lauritzen* does not apply in this case and the Ninth Circuit was correct to ignore it.

No serious issue of law is presented by this case. There is no important question of federal law to be settled and the decision of the Ninth Circuit does not conflict with *Lauritzen* or any other decision of this Court.

Respondents request respectfully that the Court deny petitioner's Petition For Writ of *Certiorari*.

DATED: March 25, 1991.

Respectfully submitted,

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